COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NO. 038079-08**

Michael Fox	Employee
STG Properties/Scott Gerace	Employer
Workers' Compensation Trust Fund	Insurer

REVEWING BOARD DECISION
(Judges Costigan, Horan and Koziol)

The case was heard by Administrative Judge Benoit.

APPEARANCES
Teresa Brooks Benoit, Esq., for the employee at hearing
James N. Ellis, Esq., for the employee on appeal
Joanne C. Heffernan, Esq., for the Workers' Compensation Trust Fund

COSTIGAN, J. The employee appeals from the administrative judge's decision allowing the Workers' Compensation Trust Fund (Trust Fund) to recoup, from his attorney's legal fee and costs, an overpayment resulting from a grossly overestimated average weekly wage used as the foundation of the § 10A conference order of payment. We agree with the employee that the judge's award of recoupment was contrary to law. We reverse that aspect of the decision, and recommit the case for further findings on the amounts of the attorney's fee and costs due under § 13A(5).

The employee, who suffers from attention deficit hyperactivity disorder (ADHD) and mild mental retardation, receives Supplemental Security income (SSI) and has a limited work history. What work the employee has performed has been for Scott Gerace,[1] doing maintenance on his rental properties at the rate of $50 per week

[1] Having denied the Trust Fund's motion at conference to join the employer as a party, (Dec. 3), and though neither party challenged the identification of the employer, the judge wrote:

> A search by me of the Massachusetts Secretary of the Commonwealth's online Corporations database indicates that there is no corporation under the name of STG Properties, but there have been two corporations in which Scott T. Gerace is listed as a corporate officer. There is no indication that either of those corporations is

for a 30-hour week. (Dec. 6; Tr. 17-18.) While so working, the employee slipped and fell, injuring his right shoulder. He has not worked since. (Dec. 5.)

The employee filed a claim for benefits which the Trust Fund defended, as the employer was uninsured on the date of injury. See G. L. c. 152, § 65(2). Pursuant to a § 10A conference order, from which both parties appealed, the employee received closed periods of benefits under §§ 34 and 35. (Dec. 3.) At hearing, the employee moved successfully to join a claim for seizures. Later, he asserted he was unable to secure medical records supporting that claim, and asked the judge to dismiss the claim without prejudice. The judge denied the request, and denied and dismissed the seizure claim with prejudice. (Dec. 3-4, 10.)

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involved with the instant claim.

(Dec. 5, n.3.) Although § 11 provides that "[t]he member shall make such inquiries and investigations as he deems necessary, and may require and receive any documentary or oral matter not previously obtained as shall enable him to issue a decision with respect to the issues before him," the judge here engaged in an unannounced fact-based investigation of what was, in any event, a non-issue -- the identity of the employer. The judge did much the same thing relative to one of the employee's treating physicians. Noting that the employee testified he treated with Dr. "Gina" Louie, the judge wrote:

> My verification of the provider's name on the website of the Massachusetts Board of Registration in Medicine indicates that she is actually Jane K. Louie, M.D., who had a Fellowship in Clinical Neurophysiology at UMass Memorial Health Center from July 1, 2008 through June 30, 2009 and currently practices in Framingham.

(Dec. 9, n.5.) When, as here, factual "inquiries and investigations" are made by the judge without notice to the parties, either before being undertaken or at least prior to the filing of a decision, due process rights may be violated:

> Fundamental requirements of due process entitle parties to a hearing at which they have an opportunity to present evidence, to examine their own witnesses, to cross-examine the witnesses of other parties, to know what evidence is presented against them and to have an opportunity to rebut it, as well as to develop a record for meaningful appellate review.

Casagrande v. Massachusetts Gen. Hosp., 15 Mass. Workers' Comp. Rep. 383, 386 (2001), citing Haley's Case, 356 Mass. 667 (1972). See also, Mielewski v. Department of Youth Servs., 25 Mass. Workers' Comp. Rep. 31, 33-34, n.6 (2011)(judge's § 1[7A] questions improperly posed to the impartial physician without notice to the parties).

The judge credited the employee's testimony that he suffered the right shoulder injury as described, and that he had been paid only $50 per week. The judge awarded § 34 total incapacity benefits for a closed period from July 9, 2008 through December 10, 2009 at the rate of $50 per week.[2] Because the conference order had awarded § 34 benefits of $240 per week, and § 35 maximum partial incapacity benefits of $180 per week, based on the employee's claimed average weekly wage of $400, the hearing decision resulted in an overpayment of $8,157.14.[3] (Dec. 13.)

The judge, however, found the employee had no means of repaying the money to the Trust Fund. He eyed the § 13A(5) attorney's fee as a source from which some amount of the overpayment could be recouped:

> M.G.L. c. 152 § 13A(5) authorizes the administrative judge to *increase or decrease the fee based on the complexity of the dispute or the effort expended by the attorney.* This authorization is equitable in nature. I feel that the equitable doctrine of unclean hands is pertinent to this situation. The attorney's gross misrepresentation of the average weekly wage by a factor of 800% caused a serious financial hardship to the WCTF in the form of an ultimate overpayment of $8,157.14. Further, the employee's attorney has misled this Department in the prosecution of the employee's claim and caused a miscarriage of justice. Equity and the spirit of the statute will be served by my imposing a signficant impact on the attorney's fee. I am, therefore, reducing the attorney's fee award to $1.00.

(Dec. 13; emphases added; underlining original.) The judge did not expressly state that the amount by which he reduced the legal fee was to be applied as a credit against

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[2] General Laws c. 152, § 34, provides, in pertinent part:

> While the incapacity for work resulting from the injury is total, during each week of incapacity the insurer shall pay the injured employee compensation equal to sixty percent of his . . . average weekly wage before the injury, but not more than the maximum weekly compensation rate, *unless the average weekly wage of the employee is less than the minimum weekly compensation rate, in which case said weekly compensation shall be equal to his average weekly wage.*

(Emphasis added.)

[3] The judge found that benefits paid pursuant to the conference order totalled $11,871.42, while benefits awarded in the hearing decision totalled $3,714.28.

the overpayment, but his further finding and order as to the employee's hearing expenses reflect that intent:

> Using the standard and customary Hearing fee of $5,209.00 as a base, the WCTF has still made an overpayment of $2,948.14. [Footnote omitted.] With regard to payment of Employee's attorney's expenses, I find that it is fair and equitable for the WCTF to receive a credit in the amount of $2,948.14.

(Id.; underlining original.) Finally, in a noteworthy display of prescience, the judge wrote:

> I am also reserving the right of the WCTF to seek recoupment for any overpayment, so that *in the event my actions in reducing the attorney's fee and/or limiting the obligation to pay the attorney's costs are overturned*, the WCTF's recoupment rights shall remain.

(Id.; emphasis added.)

The employee argues that the reduction of the § 13A(5) attorney's fee, based on the judge's finding the Trust Fund was entitled to recoupment for an overpayment, was error. We agree that the hearing fee and expenses were not a proper source for the recoupment, and reverse the decision in that regard.

Nothing in c. 152 -- certainly not the "equitable" consideration or "the spirit of the statute" cited by the judge -- supports the judge's transformation of the § 13A(5) attorney's fee and expenses into vehicles for recoupment. Given the judge's pointed findings relative to the employee's attorney's responsibility for the inflated average weekly wage claimed,[4] he certainly could have acted sua sponte to assess § 14(1) and/

[4] Under the heading, "Attorney Misfeasance and Resulting Overpayment," the judge wrote:

> The Conference Memorandum was prepared by Employee counsel [footnote omitted] and indicated a claim for § 34 benefits of $240.00 per week based on an average weekly wage of $400.00. The Workmen's [sic] Compensation Trust Fund was without firsthand knowledge of the wage history of the Employeee, and proceeded in reliance on the representation of fellow counsel. I am struck by the discrepancy between the Conference Memorandum's representation that the average weekly wage was $400.00, and the uncontroverted testimony that the Employee's pay when he worked was $50.00 per week. This represents an **800%** discrepancy. . . . Simple arithmetic indicates that the Employee's attorney's mis-representation of the average weekly wage caused the Worker's [sic] Compensation Trust Fund to overpay the Employee pursuant to the conference order a total of $9,490.36.

or § 14(2) penalties against counsel, for unreasonable prosecution of that aspect of the employee's claim.[5] He did not do so, however, nor was he asked by the Trust Fund to do so; accordingly, he may not do so on recommittal. The punitive nature of the judge's reduction of the attorney's fee and costs runs afoul of the statute and case law.[6] Just as a judge may not award an employee's attorney an enhanced fee to punish the insurer's conduct, Guzman v. ACT Abatement Corp., 23 Mass. Workers' Comp. Rep. 291, 298-299 (2009), so, too, a judge may not invoke the doctrine of "unclean hands" to punish the employee's attorney for an average weekly wage claim the judge perceives to be at least negligent, if not fraudulent. We reverse the order allowing the Trust Fund recoupment from the hearing fee and costs, and recommit the case for further findings as to the appropriate amounts of the § 13A(5) fee and related costs.[7]

> I regard the likelihood of the Worker's [sic] Compensation Trust Fund ever recovering any overpayment from the Employee as nonexistent. The question then becomes what other means exist for equitable principles to prevail. The Employee's attorney's gross mis-representation/overstatement of the average weekly wage amount is outrageous, whether it was done intentionally, through careless disregard for the truth, or through negligence. [Footnotes omitted.]

(Dec. 11-12.)

[5] General Laws c. 152, § 14, provides, in pertinent part:

> If any administrative judge . . . determines that any proceedings have been brought or defended by an employee or counsel without reasonable grounds, the whole cost of the proceedings shall be assessed against the employee or counsel, whomever is responsible.

[6] The judge mused that "[t]he Employee's attorney's actions possibly constituted a violation of M.G.L. c. 152 § 14(3)," but he rendered no "opinion or finding with regard to that aspect of the case." (Dec. 12, n.10.) In this regard, the judge acted properly, as he lacked jurisdiction to impose § 14(3) penalties which are criminal in nature -- imprisonment, fines and restitution. "Nothing in our workers' compensation act empowers administrative judges to hold criminal trials. It is therefore left to the Commonwealth to decide whether there is cause to prosecute an action under that subsection of the statute." Leveille v. Munters Corp., 25 Mass. Workers' Comp. Rep. 7, 10 (2011).

[7] Under § 13A(5), the fee may be increased or decreased "based on the complexity of the dispute or the effort expended by the attorney." In this regard, the judge on recommittal

In finding that the employee's $400 average weekly wage claim was advanced fraudulently or negligently by his attorney, the judge ignored the fact that although the Trust Fund had raised average weekly wage as an issue at the § 10A conference,[8] it did not do so at hearing. (Dec. 1; Ex. 4 [Trust Fund's Hearing Memorandum, for identification only]). On appeal, the employee argues that public policy requires he be found to have an average weekly wage equal to at least the legal minimum hourly wage in the Commonwealth. His argument finds no support in the statutory definition of average weekly wages:

> [T]he *earnings* of the injured employee during the period of twelve calendar months immediately preceding the date of injury, divided by fifty-two. . . . Where, by reason of . . . the nature or terms of the employment, it is impracticable to compute the average weekly wages, as above defined, regard may be had to the average weekly wage amount which, during the twelve months previous to the injury, was being earned by a person in the same grade employed at the same work by the same employer, or, if there is no person so employed, by a person in the same grade employed in the same class of employment and in the same district.

General Laws c. 152, § 1(1). "Earnings" is defined, inter alia, as "the salary or wages of a person." The American Heritage Dictionary, Second College Edition, 1985. The employee is bound by his credited testimony that he was paid $50 per week, i.e., that he earned $50 per week. In any event, as the employee did not argue this issue before the administrative judge, we deem it waived. Green v. Brookline, 53 Mass. App. Ct. 120, 128 (2001).

The employee further contends that the judge erred by denying and dismissing his claim based on seizures. We disagree. The judge was well within his authority to dismiss the claim, based on the employee's failure of proof. (Dec. 10-11.) There was no abuse of discretion in the judge's denial of the employee's motion to withdraw

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should consider, inter alia, that the employee proved entitlement to total incapacity and medical benefits for the seventeen-month period from July 9, 2008 through December 10, 2009. (Dec. 13.)

[8] We take judicial notice of the "Temporary Conference Memorandum Cover Form," completed and signed by both attorneys. Rizzo v. M.B.T.A., 16 Mass. Workers' Comp. Rep. 160, 161 n.3 (2002).

the claim without prejudice. Having moved to join the claim, and with the judge's unrestricted allowance of additional medical evidence, (Dec. 3, 10), it was incumbent on the employee to produce medical evidence supporting his claim. See 452 C.M.R. § 1.07(2)(f). At the July 26, 2010 hearing, the judge gave the employee thirty days, until August 25, 2010, to submit medical records addressing his seizure claim. (Tr. 127.) "It is well settled that an administrative judge has broad discretion in setting procedure for matters assigned to his docket," including broad discretion on determinations of record closure." Weitkunat, Jr. v. Springfield Muffler Co., 17 Mass. Workers' Comp. Rep. 252, 256 (2003). The deadline the judge set was reasonable, and because the employee did not meet it, dismissal of the seizure claim with prejudice was not error.

Accordingly, the order of recoupment is reversed, and the case is recommitted for an assessment and award of the § 13A(5) attorney's fee and costs. We otherwise affirm the decision.

So ordered.

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Patricia A. Costigan
Administrative Law Judge

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Mark D. Horan
Administrative Law Judge

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Catherine Watson Koziol
Administrative Law Judge

Filed: **April 17, 2012**